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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

THOMAS G. CARPENTER, Petitioner,
v.
UNIVERSAL STAR SHIPPING, S.A.; and
SEALASKA TIMBER CORPORATION, Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT SEALASKA TIMBER CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent respectfully suggests petitioner's questions presented misstate the issues before this Court. Accordingly, question 1 should be restated as follows:

> Can a vessel owner and voyage charterer be held liable under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act (hereafter "LHWCA"), as amended (33 U.S.C. § 905(b)), for injuries to a longshoreman, when: (1) the longshoreman was hurt while loading a vessel with its initial cargo; (2) the longshoreman's employer, the sole stevedore in charge of loading operations, retained control over loading operations; and (3) the stevedore created the hazard for the longshoreman and failed to rectify the hazard.

Further, question 2 should be restated as two issues as follows:

> 1. Does a time charter agreement between the vessel owner and the time charterer impose a duty of care on the vessel owner and time charterer toward a specific longshoreman under § 905(b) of the LHWCA, or does such an agreement affect only issues of indemnity between the vessel owner and time charterer, when there is no evidence that either party intended a longshoreman to be a third party beneficiary of the contract?

2. Does an agreement between the voyage charterer and the stevedore's parent company impose a duty of care on the voyage charterer toward a specific longshoreman under § 905(b) of the LHWCA, or does such an agreement affect only issues of indemnity between the voyage charterer and the stevedore's parent company, when there is no evidence that either party intended a longshoreman to be a third party beneficiary of the contract?

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RESPONDENT SEALASKA TIMBER CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Sealaska Timber Corporation respectfully requests that this Court deny the petition for writ of certiorari, which seeks review of the Ninth Circuit's opinion in this case, reported at 924 F.2d 1539 (9th Cir. 1991).

I.

STATEMENT OF THE CASE

Sealaska Timber Corporation ("Sealaska") takes issue with petitioner's statement of the case, and preserves its rights pursuant to Rule 15.1 by addressing petitioner's misstatements regarding the facts of this case and the record below.[1]

A. Description of the Parties.

At the time of the accident, petitioner Thomas G. Carpenter ("Carpenter") was a longshoreman employed by West Coast Stevedoring ("West Coast"), an Alaska native corporation.

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[1] Petitioner's statement of the case in his Petition for Writ of Certiorari ("Petition") is replete with incorrect citations to the record below, and citations to material which is not part of the record below.

Petitioner consistently misstates and misrepresents deposition testimony; the text of the Petition accompanying footnotes 2-8, 15, 22, 25 and 27 is not supported by the record referenced in those footnotes. For example, in the text accompanying footnote 8, petitioner states "it was obviously improvident to rely on the stevedore" to remedy a hole in the stow. Petition, at 5. In support of this assertion, petitioner cites to deposition testimony by the vessel's chief officer. The chief officer never made such an assertion, however, and no such conclusions can be inferred from his testimony. In addition, petitioner misstates the facts in footnote 27, and in the text accompanying footnote 8. Likewise, in footnotes 14, 15 and 21, the Petition references material which was not part of the record below.

Respondent Universal Star Shipping, S.A. ("Universal Star") owned and operated the vessel, the M/V PACIFIC VICTORY, on which the accident arose. By the terms of its charter party with the vessel's time charterer, Daiichi Chuo Kisen Kaisha ("Daiichi Chuo"), Universal Star retained control of the vessel as between itself and any charterer. Universal Star had no contractual or other relationship with either West Coast or Sealaska.

Respondent Sealaska[2] hired the M/V PACIFIC VICTORY pursuant to a voyage charter party with Daiichi Chuo to carry a shipment of logs from Hobart Bay, Alaska, to ports in the Far East.[3] Sealaska hired West Coast Stevedoring to stow the logs on board the M/V PACIFIC VICTORY.

B. Sealaska Did Not Control the Loading Operation.

As the voyage charterer, Sealaska had no input in nor control over the log stowing operation. All of the details regarding loading the logs were left entirely to the stevedore. Sealaska's only involvement was to mark bundles of logs while they were in the water to ensure that the various logs

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[2] Pursuant to Rule 29.1, Sealaska sets forth the following: Sealaska Timber Corporation's parent company is Sealaska Corporation.

[3] Affidavit of Nakatsu, CR 37; Affidavit of York, CR 39, Ex. G; Deposition of Nakatsu, CR 38, Ex. A, pp. 46-49.

could be off-loaded in the correct ports and delivered to the correct customers.[4]

Long before the logs arrived at the vessel for loading, loggers and foresters arranged the rough logs at a sorting yard.[5] As with all freshly cut timber, the logs were not uniformly shaped and their bark was intact. At the sorting yard, loggers and foresters sorted the rough logs according to size and bundled various logs together. Each bundle contained approximately the same size logs from the same type of tree; short logs were bundled together, medium logs were bundled together, and large logs were bundled together.

Tugboats then floated the bundles of logs to the vessel in rafts, where they were marked by Sealaska's on-site representative with different colored paint or ribbon before loading operations began.[6] Sealaska marked the bundles to designate the port at which each bundle would be

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[4] Dep. of D. Williams, CR 38, Ex. C, at 71; Dep. of McEwen, CR 38, Ex. F, at 48, 50.

[5] Dep. of See, CR 38, Ex. I, at 87, 152.

[6] Affidavit of York, CR 39, Ex. G; Dep. of D. Williams, CR 38, Ex. C, at 71.

unloaded.[7] Using a "line up," a list of how many board feet of a given specie of logs were to be delivered to each buyer, Sealaska designated the bundles going to each customer.[8] This was done so that each customer would receive an equal number of short, medium, and long logs, without any one customer receiving too many short logs.[9]

After Sealaska finished marking the bundles in each raft, the stevedore began loading the logs inside the vessel. This was an initial stow of cargo; logs were only being loaded and no unloading occurred. Several rafts of logs were loaded on the vessel.[10]

When loading of logs aboard the vessel began, the stevedore assumed total control of the operation. The stevedore's hatch boss directed the crane operator, who was also the stevedore's employee, to pick up each bundle of logs from the rafts and place the bundle inside a specific

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[7] Aff. of York, CR 39, Ex. G; Aff. of Nakatsu, CR 37; Dep. of McEwen, CR 69, Ex. D, at 48-50.

[8] Dep. of McEwen, CR 38, Ex. F, at 50.

[9] Dep. of McEwen, CR 38, Ex. F, at 50.

[10] Dep. of McEwen, CR 38, Ex. F, at 51.

hold.[11] The crane operator placed the logs wherever the hatch boss designated.[12] The hatch boss then used hand signals to direct the hatchworkers where to place the logs inside the hold. Only the stevedore's hatch boss or walking boss decided how the logs were positioned inside the hold.[13]

Petitioner was a hatchworker assigned to hold No. 3 of the M/V PACIFIC VICTORY at the time of the accident. As the bundles of logs were lowered into the hold, the hatchworkers, including petitioner, were responsible for: (1) helping direct the bundles of logs being loaded into the hold so as to avoid holes;[14] (2) unhooking the bundles from the cable by which the bundles were lowered into the hold;[15] (3) rolling bundles of logs inside the hold to achieve

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[11] Dep. of See, CR 38, Ex. I, at 106; Dep. of Aceveda, CR 39, Ex. C, at 8-9.

[12] Dep. of Aceveda, CR 39, Ex. C, at 98; Dep. of Ward, CR 39, Ex. B, at 15.

[13] Dep. of Aceveda, CR 39, Ex. C, at 12-13; Dep. of R. Peterson, CR 69, Ex. F, at 13; Dep. of D. Williams, CR 38, Ex. C, at 51.

[14] Dep. of Hill, CR 39, Ex. D, at 7.

[15] Dep. of Hill, CR 39, Ex. D, at 7.

the tightest possible stow and to cover holes;[16] and (4) informing the hatch boss of potential problems with the stow, including suggesting that a bundle of logs be smashed down to cover holes.[17]

Sealaska had no input in nor control over the log stowing operation. Sealaska's on-site representative never told the stevedore or its employees how to load the logs into the hold nor did he suggest how the logs should be stowed.[18] The stevedore, an independent contractor, alone decided how logs were to be positioned in the hold.[19]

The accident occurred during the third day of loading logs. The stevedore gang working hold No. 3, including Carpenter, was in the process of rolling logs in the hold to

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[16] Dep. of Hill, CR 39, Ex. D, at 7.

[17] Dep. of See, CR 38, Ex. I, at 83.

[18] Dep. of D. Williams, CR 38, Ex. C, at 71-72; Dep. of York, CR 38, Ex. B, at 60-61; Dep. of Aceveda, CR 39, Ex. C, at 40, 41, 201; Affidavit of York, CR 39, Ex. G; Dep. of McEwen, CR 38, Ex. F, at 49-50.

[19] Dep. of York, CR 38, Ex. B, at 60-61; Affidavit of York, CR 39, Ex. G.

fill gaps in the stow.[20] Gaps are filled by dropping a bundle of logs as near as possible to the gap and then moving the bundle into the void.[21] Carpenter was injured when he stepped or slipped into a gap that began at the surface of the stow of logs and extended at angles downward and horizontally to the bottom of the hold.[22]

Avoiding gaps in the stow is the stevedore's sole responsibility.[23] By all accounts, however, it is impossible to avoid all gaps and holes in a stow of logs.[24]

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[20] Dep. of D. Williams, CR 38, Ex. C, at 7-8; Dep. of Hill, CR 39, Ex. D, at 86-87.

[21] Dep. of D. Williams, CR 38, Ex. C, at 7-8; Dep. of Strong, CR 38, Ex. G, at 131.

[22] Dep. of Aceveda, CR 39, Ex. C, at 50-53, 183-185, 187, 277-278.

[23] Even petitioner concedes this point by stating, "[t]o avoid deep holes, the stevedore is supposed to alternate the pattern or length of the logs, so no gap in the stow is more than several feet deep." Brief of Appellant, at 5, in *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539 (9th Cir. 1991); *see also* Dep. of Strong, CR 38, Ex. G, at 109-111.

[24] Dep. of Aceveda, CR 39, Ex. C, at 8, 13, 14-15, 21; Dep. of Strong, CR 38, Ex. G, at 109.

C. Summary Judgment Dismissing Carpenter's Claims.

Carpenter received benefits under the LHWCA. In addition, he brought an action for personal injury under § 905(b) of the LHWCA to recover from Universal Star and Sealaska. Carpenter alleged Universal Star and Sealaska should have intervened in the log stowing operation to eliminate gaps in the stow into which he might fall. There is no evidence, however, that the accident was proximately caused by anything other than Carpenter's and his employer's negligent conduct.

Universal Star and Sealaska cross-claimed against each other for contractual indemnity. After extensive discovery,[25] Sealaska moved for summary judgment of dismissal of Carpenter's claims. Universal Star joined in Sealaska's motion for summary judgment. The District Court initially ruled that summary judgment was proper with respect to Carpenter's claims against both Universal Star and Sealaska, yet held there was a question of fact regarding liability for negligent hiring. Sealaska moved for reconsideration of the court's decision regarding the existence of a cause of action under § 905(b) based upon

[25] Approximately 40 depositions had been taken by the parties when Sealaska moved for summary judgment.

negligent hiring. Carpenter moved for reconsideration of the court's dismissal of the negligent failure to intervene claim.

On reconsideration, following review of the entire record, the District Court entered summary judgment dismissing all of Carpenter's claims.[26] The Ninth Circuit affirmed, and denied Carpenter's motion for rehearing; no active judge of the court requested a vote on Carpenter's suggestion of rehearing *en banc*.

II.
REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

A. The Ninth Circuit's Decision in This Case Does Not Present a Conflict Among the Circuits On the Same Matter.

1. This Case Involves Issues Different from *Woods* and *Derr*.

Carpenter suggests his petition for writ of certiorari should be granted in the present case because there is a purported conflict among the federal circuits, including the

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[26] Carpenter erroneously states in his Petition the District Court held a vessel's duty to intervene is limited to dangers in the ship's gear. *See* Petition, at 10. On the contrary, the District Court granted Sealaska's motion for summary judgment of dismissal because there was no evidence Sealaska created the hazard by actively directing the log stow. *See* Appendix to Petition, at B-5 - B-6, C-6.

Ninth Circuit. As evidence of this conflict, petitioner cites the dissenting opinion in *Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050 (1990).[27] Petitioner argues that Justices White, Kennedy, and the Chief Justice dissented in *Sammiline* "on essentially the same issue"[28] as presented here. As readily evidenced by Justice White's dissenting opinion, however, the issues are dissimilar.

Justices White, Kennedy, and the Chief Justice wanted to resolve a conflict among the circuits regarding whether a longshoreman who is injured while unloading a vessel can recover under the LHWCA, when the defectively stowed cargo which resulted in his injury was caused by a separate, independent stevedore which loaded the cargo in a different port. Dissenting from the denial of the petition for a writ of certiorari, Justice White (joined by the Chief Justice and Justice Kennedy) wrote as follows:

> The Fifth Circuit held in this case that, based on its duties to longshoremen outlined in *Scindia Steam Navigation Co. v. De los Santos*, 451 U.S. 156 (1981), a vessel can be

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[27] On petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, seeking review of *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1989).

[28] Petition, at 10.

> held liable under § 5(b) of the Longshoremen's and Harbor Workers' Compensation Act . . . for injuries to a longshoreman unloading a vessel caused by the defective stowage of cargo by an independent stevedore. As recognized by the court below, the Third Circuit has held that a shipowner cannot be held liable for such injuries.

Sammiline Co., Ltd. v. Woods.[29]

The Justices specifically identified a conflict between the Fifth Circuit's decision in *Woods v. Sammisa Co., Ltd.*[30] and the Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3rd Cir. 1987), *cert. denied*, 486 U.S. 1007 (1988).[31] The conflict referred to by the three dissenting Justices is one regarding a longshoreman's recovery under LHWCA § 905(b) for injuries arising during unloading operations. Like *Woods*, the longshoremen in

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[29] 493 U.S. at 1050 (citations omitted) (emphasis added).

[30] 873 F.2d 842 (5th Cir. 1989), *cert. denied*, *Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050 (1990).

[31] *Sammiline*, 493 U.S. at 1050.

Derr were injured when cargo fell down on them,[32] while they were unloading a vessel. The cargo they were unloading was loaded by an independent stevedore in foreign ports.[33] Unlike *Woods*, however, the *Derr* court ruled the vessel was not liable under § 905(b) for injuries suffered by a longshoreman during unloading operations, when the cargo was loaded by an independent, foreign stevedore.[34] As the dissenting Justices in *Sammiline* recognized, there does appear to be a conflict among the circuits regarding unloading cases like *Woods* and *Derr*.

The present case, however, is unlike either *Woods* or *Derr*. Here, petitioner was injured while loading the vessel with its initial cargo. The defective stowage condition which resulted in Carpenter's injury was caused by his own employer -- the only stevedore in charge of the loading operation. Petitioner has failed to identify a conflict among the circuits "on the same matter" presented here.[35] In fact,

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[32] *Derr*, 835 F.2d at 491.

[33] *Derr*, 835 F.2d at 491.

[34] *Compare Derr*, 835 F.2d at 493, 496, 497, *with Woods*, 873 F.2d at 849, 854; *see also Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050 (1990) (White, J., Kennedy, J., Rhenquist, C.J., dissenting).

[35] *See* Rule 10.1(a).

Sealaska's research has disclosed there is no conflict among the circuits with respect to the Ninth Circuit's decision in this case. Petitioner incorrectly relies on the *Sammiline* dissenting opinion as grounds for this Court to grant his petition for writ of certiorari in the present case.

Although the Court may be inclined at some point to revisit the issues addressed in *Woods v. Sammisa Co., Ltd.*,[36] the present case does not involve the same issue, and this case is therefore not "on the same matter" as *Woods*. Unlike the situation presented in *Woods*, the record in the present case does not support the theory that Sealaska had operational control over the loading operation.[37] In

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[36] 873 F.2d 842 (5th Cir. 1989), *cert. denied, Sammiline Co., Ltd. v. Woods*, 493 U.S. 1050 (1990).

[37] *See* Appendix to Petition for Writ of Certiorari, at B-3 (District Court held Sealaska's agent did not have authority to issue direct orders to the stevedore's employees), B-5 (District Court held there is no evidence Sealaska created the hole by actively directing the log stow), C-6 (District Court found "it was the stevedore who directed log placement and was best able to avoid dangerous placement of the logs."); *compare* Respondents John and Beverly Woods' Brief in Opposition to Petition for a Writ of Certiorari, at 3 (there was evidence the vessel-owner exercised authority over where the cargo was to be stowed), in *Sammiline Co., Ltd. v. Woods, et al.*, 493 U.S. 1050 (1990) (No. 89-524); *Woods v. Sammisa Co., Ltd.*, 873 F.2d at 857 (there was evidence the time charterer had some degree of operational control over loading operations).

addition, the record does not support the theory that the vessel owner had operational control.[38] In this case, the stevedore had sole control over the loading operation and exercised that control free from interference by either Sealaska or the vessel owner.[39]

The scenario presented in *Woods* is further distinguishable from the present case because the injury in *Woods* arises in the context of unloading cargo stowed by a separate and independent stevedore.[40] There, the unloading stevedore confronted a hazard which was not of its own making. In *Woods* the problem confronted by the unloading stevedore in New Orleans was a function of the way cargo was stowed by a foreign stevedore in Brazil.[41] The *Woods* decision presents a situation where the jury could find that the vessel owner, vessel operator, and time charterer

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[38] *See Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1544 (9th Cir. 1991).

[39] Appendix to Petition for Writ of Certiorari, at C-6 (the stevedore directed log placement and was in the best position to avoid dangerous placement of the logs).

[40] *Woods*, 873 F.2d at 844, 845.

[41] *Woods*, 873 F.2d at 845.

exercised even more control over the loading operations than did the stevedore.[42] No such inference is justified here.

If this Court is interested in expanding or further defining the Court's decision in *Scindia*,[43] then an unloading case similar to *Woods* and *Derr* would better present such an opportunity. This is so because a case similar to *Woods* and *Derr* would present the situation where the vessel owner and time charterer exercised operational control over the loading operation, and where their conduct presented a distinct hazard to the unloading stevedore and its longshoremen. Granting the petition for writ of certiorari here would not assist this Court in resolving the issue presented in *Woods*.

2. This Case Is Not in Conflict with Cases Cited by Petitioner.

Petitioner suggests this case is part of an enduring conflict among the circuits, including the Ninth Circuit.[44] Petitioner argues the source of this purported conflict is the

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[42] *See* Respondents John and Beverly Woods' Brief in Opposition to Petition for a Writ of Certiorari, at 3, 9, 10, 17, in *Sammiline*, 493 U.S. 1050; *see also* Brief in Response of Pioneer Navigation, Ltd., at 1, in *Sammiline*, 493 U.S. 1050.

[43] *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981).

[44] Petition, at 10.

Court's decision in *Scindia*.[45] Petitioner has, however, failed to identify a conflict among the circuits regarding whether a vessel has a duty to intervene during initial loading operations, when the longshoreman's employer caused the injury, and when the longshoreman's employer retained control over cargo loading operations.[46] As evidence of the purported conflict, petitioner cites to cases which are readily distinguishable from the Ninth Circuit's decision here, and which do not address issues on the same matter.

For example, petitioner misstates the Fifth Circuit's holding in *Woods v. Sammisa Co., Ltd.* to support his asserted conflict.[47] The *Woods* decision addressed a longshoreman who was injured while unloading a vessel in New Orleans, after an independent stevedore in Brazil

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[45] Petition, at 11. When discussing the *Scindia* decision, however, petitioner erroneously states the Court "cited" and "described" a continuing duty on the vessel. Petition, at 11. Contrary to petitioner's assertions, the Court never refers to an existing duty. Rather, the Court merely queries whether any duty actually exists. *Scindia*, 451 U.S. at 172-173, 176. Even so, the query related only to a duty regarding repairing defective ship's gear. *Scindia*, 451 U.S. at 176.

[46] *See* Sealaska's questions presented, *supra*, at (i).

[47] *See* Petition, at 13.

improperly loaded a cargo of steel pipe. Because the *Woods* court held there was no evidence the vessel had actual knowledge of the hazardous condition in the stow, the court ruled the jury should not have been instructed regarding the third *Scindia* duty, which requires the vessel to intervene.[48] Like *Woods*, the Ninth Circuit here held neither Sealaska nor Universal Star had a duty to intervene.[49]

Petitioner similarly misstates other cases' holdings to support his theory of a supposed conflict. For example, he mistakenly relies on the Fifth Circuit's decision in *Futo v. Lykes Bros. S.S. Co., Inc.*, 742 F.2d 209, 215 (5th Cir. 1984).[50] In *Futo*, the Fifth Circuit affirmed summary judgment of dismissal in favor of the shipowner when the hazard, no railing on scaffolding, "was a temporary structure, not a part of the ship itself, its gear, or equipment, which was created and used entirely by the independent contractor, who both owned and controlled it. Nothing that the shipowner did, and nothing about the ship itself . . .

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[48] *Woods*, 873 F.2d at 852-853.

[49] *Carpenter*, 924 F.2d at 1544.

[50] *See* Petition, at 13.

contributed to the hazard."[51] As clearly evidenced by the court's ruling, *Futo* is not at odds with the Ninth Circuit's decision here.[52]

Addressing a discussion of equity in a pre-*Scindia* decision by this Court,[53] petitioner suggests the Ninth

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[51] *Futo*, 742 F.2d at 22.

[52] Likewise, the Fifth Circuit's decision in *Casaceli v. Martech Int'l, Inc.*, 774 F.2d 1322 (5th Cir. 1985), *cert. denied*, *Casaceli v. Cheramie Bo Truc #11, Inc.*, 475 U.S. 1108 (1986), does not state what petitioner asserts in his petition. *See* Petition, at 13. Rather, the language cited by petitioner is merely the court's discussion of *Futo*. In fact, the *Casaceli* case is in no way analogous to the present case. There, a diver drowned while he was repairing a vessel which was docked at a slip. *Casaceli*, 774 F.2d at 1324. The court reversed jury verdicts against the slip owner and vessel owner because there was insufficient evidence they were negligent. *Id.* at 1324, 1331.

Similarly, the Second Circuit's decision in *Lieggi v. Maritime Co. of Philippines*, 667 F.2d 324 (2nd Cir. 1981), on which petitioner also relies, is not inconsistent with the Ninth Circuit's decision here. In *Lieggi*, the vessel owner made an affirmative undertaking to correct a hazardous transitory condition resulting from the presence of grease or oil on the ship's deck, yet failed to clean it up. *Lieggi*, 667 F.2d at 325-326. Because the vessel owner assumed the duty to clean the hazard, the court held the issue of shipowner negligence was properly presented to the jury. *Id.* at 329.

[53] *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979), *reh'g denied*, 444 U.S. 889 (1979). The *Edmonds* decision is readily distinguishable from the present case. In *Edmonds*, no voyage

(continued...)

Circuit's decision here contradicts Supreme Court precedent. Petitioner, however, apparently misunderstands the equitable principles behind the LHWCA. If the vessel is not negligent, then an injured longshoreman cannot recover damages from the vessel under the LHWCA. Congress specifically rejected the no-fault liability scheme which existed prior to the LHWCA's amendments in 1972.[54] Here, the District Court and the Ninth Circuit both concluded petitioner's injury was caused solely by his employer's negligent conduct. Because Sealaska and Universal Star did not cause his injury, the equity principles petitioner addresses do not apply.

3. The Ninth Circuit's Decision Affirming Summary Judgment of Dismissal Was Not Dependent on Language Regarding the Ship's Gear.

The Ninth Circuit could have affirmed Sealaska's summary judgment of dismissal without discussing the ship's

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[53](...continued)
charterer or time charterer were present. There, a longshoreman was injured while unloading cargo from a vessel. His employer, the stevedore, was hired directly by the ship owner. A jury found the vessel owner partially responsible for the longshoreman's injury. *Edmonds*, 443 U.S. at 258. No similar facts exist here.

[54] *Scindia*, 451 U.S. at 164, 165; Pub. L. No. 92-576, 1972 U.S.C.C.A.N. 4698, 4703-4704 (codified at 33 U.S.C. § 905).

gear. Sealaska did not rest its case below on grounds that the duty to intervene is limited to dangers in the ship's gear. In fact, one of Sealaska's primary arguments below was that it had no duty to intervene in the cargo operation when it did not actively direct the log stow and the hazard was created solely by Carpenter's employer, the stevedore, in discharging the stevedore's exclusive duty.[55] Sealaska argued the gaps in the stow were created by the stevedore and the resulting danger it created was entirely unrelated to Sealaska's action or inaction. As a result, the Ninth Circuit had an independent reason for affirming the District Court's order granting summary judgment of dismissal.

After considering a voluminous record, thorough briefs by counsel, and after hearing oral argument, the District Court ruled there was no issue of material fact for a jury to decide.[56] The Ninth Circuit considered the same

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[55] *See* Brief of Appellee Sealaska Timber Corporation, at 29-30, 33, in *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539 (9th Cir. 1991) ("Brief of Appellee Sealaska").

[56] Appendix to Petition for Writ of Certiorari, at B-1, B-2 (District Court's order granting partial summary judgment of dismissal); Appendix to Petition for Writ of Certiorari, at C-2 (District Court's order granting full summary judgment of dismissal); *Carpenter v. Universal Star Shipping, S.A.*, 924 F.2d 1539, 1547 (9th Cir. 1991) (affirming the (continued...)

record *de novo*,[57] and likewise concluded there was no issue of material fact. The District Court and Ninth Circuit both found no evidence that Sealaska actively participated in the log loading operation.[58] Both courts found no evidence that Sealaska assumed a duty to intervene in this case.[59] Because Carpenter's injuries were caused only by the negligent conduct of his employer, the stevedore, Sealaska was not liable for negligence under § 905(b).[60]

This Court should not grant certiorari in this case because the Ninth Circuit could have affirmed the District Court's order granting summary judgment without stating anything about the ship's gear. In essence, summary judgment could have been affirmed on the grounds that the

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[56](...continued)
district court's order of summary judgment for Sealaska and Universal Star).

[57] *Carpenter*, 924 F.2d at 1542.

[58] Appendix to Petition for Writ of Certiorari, at B-5 - B-6 (District Court's order granting partial summary judgment, holding "[t]here is no support for a finding the [sic] Sealaska created the hazard by actively directing the log stow."); *Carpenter*, 924 F.2d at 1544.

[59] *Carpenter*, 924 F.2d at 1544.

[60] *See Carpenter*, 924 F.2d at 1544.

injury was caused by a dangerous condition created by the stevedore and which was not created by any action or inaction by Sealaska. Because petitioner's injuries were caused by a dangerous condition which was created by only the stevedore, not by Sealaska, summary judgment was proper on this ground alone. Any broad statement of law made by the Ninth Circuit regarding the duty to intervene being related only to hazards presented by ship's gear, therefore, is merely dictum. This Court has repeatedly recognized the inappropriateness of deciding an issue presented by only dictum.[61]

B. The Charter Provisions In Question Present No Issue Warranting This Court's Review.

Petitioner has failed to identify a conflict among the circuits regarding the charter provisions at issue here. The issue presented by petitioner is not one which this Court should resolve.[62]

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[61] *See, e.g., Esti Pipeline Project v. Missouri*, 484 U.S. 495, 516 n.11 (1988) (there is no reason for the Supreme Court to address a District Court's or a Court of Appeals' comments which were pure dictum); *see generally Maryland v. Baltimore Radio Show*, 338 U.S. 912, 919 (1950) (Frankfurter, J.) (concurring in denial of petition for writ of certiorari and discussing generally the bases for such denials).

[62] *See* Rule 10.1(a).

Voyage charter provisions are instruments of contract. As case law consistently holds, a contract may establish a duty owed to a party by the vessel owner,[63] yet only if the parties intend to create such an obligation and draft their agreement accordingly. The facts of each case and the language of each contractual provision are unique. A duty arises only if the specific contractual language creates a duty. Here, the language addressed issues of indemnification, not a duty to intervene. The Ninth Circuit did not set forth a uniform rule in this case; it applied the specific contract language and reached a reasoned conclusion based on the specific facts presented.

Petitioner asserts Sealaska's voyage charter contract with the stevedore's parent company creates a duty owed to specific longshoremen. This assertion is meritless. A duty, if any exists, is owed only to the stevedore's parent company, and then only for indemnification. No language in the voyage charter agreement states Sealaska owed a duty to the longshoremen, and no such inferences are warranted.[64] Similarly, no other evidence demonstrates the

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[63] *See, e.g., Carpenter,* 924 F.2d at 1545.

[64] Petitioner also argues Sealaska's marketing contract with the stevedore's parent company created a purported duty owed to petitioner (continued...)

parties intended a longshoreman to be a third party beneficiary of the contract.

Likewise, the ship owner's time charter does not create a duty owed by Sealaska to the longshoremen. This Court should not review this issue when there is no evidence that any court has construed such language in the fashion petitioner suggests. The construction of the specific contract language in this case does not present a question of great importance which demonstrates the need for intervention or review by this Court.[65]

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[64](...continued)
to enforce OSHA regulations. *See* Petition, at 9. It is well-established law, however, that such contract provisions do not create a duty to specific longshoremen. *See, e.g., Williams v. Fenix & Scisson, Inc.*, 608 F.2d 1205, 1208, 1209 (9th Cir. 1979); *George v. Intercontinental Transp.*, 566 F.Supp. 275, 278-279 (S.D.N.Y. 1983). Petitioner does not challenge this rule in his petition.

[65] *See* Rule 10.1.

III.
CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

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